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LOO CHOOI GAIK v. DR LOH LAY SOON

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
ABANG ISKANDAR JCA
NALLINI PATHMANATHAN JCA
B [CIVIL APPEAL NO: P-02(NCVC)(W)-975-05-2017]
21 NOVEMBER 2018

C ***TORT:*** *Negligence – Medical negligence – Facial cosmetic operation – Plaintiff suffered from nosomical infection of skin complications after procedure at defendant's clinic – Defendant elected to submit no case to answer – Whether plaintiff's evidence ought to be assumed to be true in absence of evidence from defendant – Whether plaintiff established breach of duty – Doctrine of res ipsa loquitor – Whether applicable – Whether causation established – Whether plaintiff proved case on balance of probabilities*

D ***CIVIL PROCEDURE:*** *Trial – Submission of no case to answer – Medical negligence – Facial cosmetic operation – Plaintiff suffered from nosomical infection of skin complications after procedure at defendant's clinic – Defendant elected to submit no case to answer – Whether plaintiff's evidence ought to be assumed to be true in absence of evidence from defendant – Whether plaintiff established breach* E *of duty – Doctrine of res ipsa loquitor – Whether applicable – Whether causation established – Whether plaintiff proved case on balance of probabilities*

The plaintiff had a facial cosmetic operation done at the defendant's clinic. After the procedure was performed, the plaintiff complained of swelling. F Despite the prescription of antibiotics, there was no improvement. Subsequently, the plaintiff went to see one Dr Donny Oh, a practising consultant plastic surgeon in Penang Adventist Hospital, who removed the implanted 'cones' and 'threads' from the plaintiff's facial tissue. However, the infection persisted with discharge. Subsequently, the plaintiff was referred to Dr Chow Ting Soo ('PW6') an infectious disease consultant at the G Penang General Hospital, who diagnosed the plaintiff as suffering from 'nosomical infection of the skin which was complicated after the procedure'. He prescribed oral medication which healed the infection but the plaintiff was still left with a scar. As a result of this, the plaintiff maintained that she suffered considerable mental pain and anguish. The plaintiff initiated this suit H against the defendant for negligence. After the close of the plaintiff's case, the defendant submitted that there was no case to answer. The judge agreed with the said submission and dismissed the claim. The issues that arose in this appeal were (i) what was the position in law when a defendant elected to submit that there was no case to answer; (ii) how was the plaintiff to establish I that the standard of care had been breached; (iii) whether there was a breach of the duty of care in the failure of the defendant to advise on the risk; (iv) whether the doctrine of *res ipsa loquitor* was inapplicable in a medical negligence case; and (v) whether causation was established by the plaintiff.

Held (allowing appeal; setting aside decision of High Court)
Per Nallini Pathmanathan JCA delivering the judgment of the court:

(1) Following the Federal Court decision of *Jaafar Shaari* and *Takako Sakao,* the evidence by the plaintiff must be assumed to be true in the absence of any evidence from the defendant. The Judicial Commissioner ('JC') misdirected himself by failing to apply this principle and instead applied treating the case as if the defendant had led evidence. The JC also erred in preferring the defendant's version in the absence of any evidence whatsoever adduced by the defendant. By this misdirection, the JC had arrived at an erroneous conclusion and that alone was an appealable error that warranted intervention. (para 10)

(2) The plaintiff had successfully established that there was a breach of duty on the part of the defendant by relying on the evidence of the treating doctors, PW4, PW5 and PW6. The plaintiff was not obliged to bring in separate medical experts to establish the breach of duty. As to whether there was a breach of duty of care in the failure of the defendant to advise on the risk, the JC had erred in failing to treat the plaintiff's evidence as being true. Instead, the JC had queried the veracity or credibility without hearing any rebuttal evidence from the defendant. He should have accepted the plaintiff's evidence and had he done so, he would have concluded differently. Further, the doctrine of *res ipsa loquitor* which is an evidential doctrine, was indeed applicable in all negligence cases including medical negligence. (paras 11, 12 & 13)

(3) Causation had been established by the plaintiff, which was evident from the testimony of PW6 who diagnosed the plaintiff's condition as 'nosocomial infection of the skin which was complicated after the procedure.' The use of that phrase in itself showed that the nosocomial infection arose prior to further complications. In all probability, the infection arose *in situ* at the defendant's clinic. Moreover, there was no break in her continuously deteriorating situation. Further, the infection was localised rather than systemic. All these factors suggested on a balance of probabilities that the cause of infection was the lack of sterility as testified by the treating doctors. (para 14)

(4) The plaintiff had succeeded in establishing a case of negligence against the defendant, which was never rebutted. The failure on the part of the defendant to testify was the crux of the case. The plaintiff had established from the evidence a *prima facie* case which warranted rebuttal. Adopting the position of no case to answer and taking the decision not to call the doctor meant that the plaintiff's *prima facie* case was not rebutted at all. The only reasonable conclusion to arrive at was that the plaintiff had proven its case on a balance of probabilities. The defendant was thus liable. (para 17)

A ***Bahasa Malaysia*** *Headnotes*

Plaintif telah melakukan satu pembedahan kosmetik muka di klinik defendan. Selepas prosedur itu dilaksanakan, plaintif mengadu mengalami bengkak. Walaupun diberikan preskripsi antibiotik, keadaan plaintif tidak pun pulih. Seterusnya, plaintif telah pergi ke Dr Donny Oh, seorang
B perunding pakar bedah plastik di Hospital Penang Adventist, yang telah mengeluarkan 'kon-kon' dan 'benang-benang' yang diimplan daripada tisu muka plaintif. Walau bagaimanapun, jangkitan berterusan dan bernanah. Plaintif telah dirujuk kepada Dr Chow Ting Soo ('PW6'), seorang perunding penyakit berjangkit di Penang General Hospital, yang mendiagnosis plaintif
C mengalami 'komplikasi jangkitan nomosikal kulit selepas prosedur'. Dia memberikan preskripsi ubat oral yang berjaya memulihkan jangkitan tersebut tetapi plaintif masih mengalami parut. Akibatnya, plaintif mengekalkan bahawa dia mengalami sakit mental dan penderitaan. Plaintif memulakan guaman ini terhadap defendan atas kecuaian. Selepas penutupan kes plaintif,
D defendan menghujahkan bahawa tiada kes untuk dijawab. Hakim bersetuju dengan hujahan tersebut dan menolak tuntutan plaintif. Isu-isu yang timbul dalam rayuan ini adalah (i) apakah kedudukan undang-undang apabila defendan memilih untuk menghujahkan bahawa tiada kes untuk dijawab; (ii) bagaimana harus plaintif membuktikan bahawa standard berjaga-jaga
E telah dilanggar; (iii) sama ada terdapat pelanggaran kewajipan berjaga-jaga apabila defendan gagal memberikan nasihat berkenaan risiko yang terlibat; (iv) sama ada doktrin *res ipsa loquitor* tidak terpakai dalam kes kecuaian perubatan; dan (v) sama ada penyebab dibuktikan oleh plaintif.

Diputuskan (membenarkan rayuan; mengetepikan keputusan Mahkamah
F **Tinggi)**
Oleh Nallini Pathmanathan HMR menyampaikan penghakiman mahkamah:

(1) Mengikut keputusan Mahkamah Persekutuan *Jaafar Shaari* dan *Takako Sakao*, keterangan plaintif boleh dianggap benar dalam ketiadaan apa-apa
G keterangan defendan. Pesuruhjaya Kehakiman ('PK') telah tersalah arah kerana gagal memakai prinsip ini dan sebaliknya menganggap kes seperti defendan telah memberikan keterangan. PK juga khilaf apabila memilih untuk menerima versi defendan dalam ketiadaan apa-apa keterangan oleh defendan. Dengan salah arahan ini, PK telah mencapai kesimpulan
H yang salah dan itu adalah satu kekhilafan yang boleh dirayu yang mewajarkan campur tangan.

(2) Plaintif telah berjaya membuktikan terdapat pelanggaran kewajipan dari pihak defendan dengan bergantung pada keterangan doktor-doktor yang merawatnya, PW4, PW5 dan PW6. Plaintif tidak mempunyai obligasi
I untuk membawa saksi-saksi perubatan lain untuk membuktikan pelanggaran kewajipan. Berkenaan sama ada terdapat pelanggaran kewajipan berjaga-jaga dalam kegagalan defendan memberi nasihat berkenaan risiko yang terlibat, PK telah terkhilaf apabila gagal

menganggap keterangan plaintif sebagai benar. Sebaliknya, PK telah menyoal kebenaran dan kesahihannya tanpa mendengar apa-apa penyangkalan keterangan dari defendan. PK harus menerima keterangan plaintif dan sekiranya beliau berbuat demikian, beliau akan mencapai kesimpulan yang berbeza. Seterusnya, doktrin *res ipsa loquitor* iaitu satu doktrin jelas, adalah dipakai dalam semua kes-kes kecuaian termasuk kecuaian perubatan.

(3) Penyebaban telah dibuktikan oleh plaintif, yang jelas daripada testimoni PW6 telah mendiagnosis plaintif sebagai 'komplikasi jangkitan nomosikal kulit selepas prosedur'. Penggunaan frasa ini menunjukkan bahawa jangkitan nomosikal timbul sebelum komplikasi lanjut. Dalam segala kebarangkalian, jangkitan timbul *in situ* di klinik defendan. Lebih-lebih lagi tiada kelompangan dalam keadaan merosot yang dialami plaintif. Tambahan lagi, jangkitan adalah setempat dan bukan sistemik. Faktor-faktor ini menyarankan atas imbangan kebarangkalian bahawa punca jangkitan adalah kekurangan kesterilan seperti yang diterangkan oleh doktor-doktor yang merawat.

(4) Plaintif telah berjaya membuktikan kes kecuaian terhadap defendan, yang tidak disangkal. Kegagalan defendan untuk memberikan keterangan adalah asas kes. Plaintif telah membuktikan keterangan bahawa terdapat kes *prima facie* yang mewajarkan penyangkalan. Memakai kedudukan tiada kes untuk dijawab dan mengambil keputusan untuk tidak memanggil doktor bermaksud bahawa kes *prima facie* plaintif tidak disangkal langsung. Keputusan yang munasabah yang perlu dicapai adalah bahawa plaintif telah membuktikan kes atas imbangan kebarangkalian. Defendan, dengan itu adalah bertanggungjawab.

Case(s) referred to:

Bolam v. Friern Hospital Management Committee [1957] 1 WLR 582 ***(refd)***
Foo Fio Na v. Dr Soo Fook Mun & Anor [2007] 1 CLJ 229 FC ***(refd)***
Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***
Krishnan Nambiar G Perabakaran & Ors v. Dr P Mahendran & Anor [2004] 5 CLJ 73 HC ***(refd)***
Ratcliffe v. Plymouth and Torbay HA [1998] Lloyd's Rep Med 162 ***(refd)***
Shalini Kanagaratnam v. Pusat Perubatan Universiti Malaya & Anor [2016] 6 CLJ 225 CA ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***

For the appellant - Simon Murali & Kok Yuen Lin; M/s Simon Murali & Co
For the respondent - Maidzuara Mohammad & Harish Nair; M/s Raja, Darryl & Loh

[Editor's note: For the High Court judgment, please see Loo Chooi Gaik v. Dr Loh Lay Soon [2017] 1 LNS 552 (overruled).]

Reported by Suhainah Wahiduddin

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JUDGMENT

Nallini Pathmanathan JCA:

[1] On 10 May 2013, the plaintiff attended at the defendant's clinic for a facial cosmetic operation known as Bi-Directional Silhouette Futures with Restorable Cones. It was a silhouette soft lifting procedure to rejuvenate her face. The procedure was performed and on 14 May 2013, the plaintiff went back to remove sutures. On 23 May 2013, the plaintiff complained of swelling and went back to the defendant's clinic. Despite the prescription of antibiotics, there was no improvement so she attended again on 27 May 2013 where the defendant performed exploration on the affected area and administered dressing on the wound.

[2] There was still no improvement and the defendant then administered further antibiotics namely Rocephine onto the affected part. This was done on several occasions including 27, 28 and 29 May, 2 and 5 June 2013. Oral medication was also prescribed. No improvement followed.

[3] On 12 June 2013 she was referred to Dr Donny Oh who was a practising consultant plastic surgeon in Penang Adventist Hospital. He removed the implanted 'cones' and 'threads' from the facial tissue. He managed to remove three of the four implants but one could not be found. The plaintiff then saw Dr Donny Oh for follow up throughout June till July 2013. However, the infection persisted with discharge. She was then admitted to the hospital from 15 July 2013 to 22 July 2013.

[4] She was next referred to one Dr Vyjayanthi who specialised in infectious diseases. Again, there was no improvement. During this time, the plaintiff was also seen by a clinical psychologist who diagnosed her with mild depression.

[5] Then on 1 August 2013, the plaintiff was referred to Dr Chow Ting Soo (PW6) at Gleneagles who as an infectious disease consultant at the Penang General Hospital and a visiting consultant at Gleneagles. He diagnosed the plaintiff as suffering from "nosocomial infection of the skin which was complicated after the procedure". Dr Chow Ting Soo explained that this infection was most likely caused by MRSA or MR-CoNS. The prior medications and procedures were ineffective against these micro-organisms. He prescribed oral medication which healed the infection and dried up the wound.

[6] However, the plaintiff was left with a scar and claims to have lost her aesthetic beauty. The plaintiff went to South Korea to have the scar removed but the scar remains visible until today.

[7] As a result of this, the plaintiff maintains that she suffered considerable mental pain and anguish.

[8] The plaintiff then initiated this suit against the defendant in negligence, which proceeded in the High Court in Penang. After the close of the plaintiff's case with testimony from no less than ten witnesses, the defendant submitted that there was no case to answer. The learned judge agreed with this submission and dismissed the claim.

[9] On appeal before us, the following issues arose for consideration:

(i) What is the position in law when a defendant elects to submit that there is no case to answer?

(ii) How is the plaintiff to establish that the standard of care has been breached?

(a) Is it necessary to call separate medical experts apart from the treating doctors to establish a breach of the standard of care in relation to the *Bolam* test (*Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582)?

(iii) Was there a breach of the duty of care in the failure of the defendant to advise on the risk as determined in *Foo Fio Na* (*Foo Fio Na v. Dr Soo Fook Mun & Anor* [2007] 1 CLJ 229)?

(iv) Is the doctrine of *res ipsa loquitur* inapplicable in a medical negligence case?

(v) Was causation established by the plaintiff?

Issue (i): What Is The Position In Law When A Defendant Elects To Submit That There Is No Case To Answer?

[10] Following the Federal Court decisions of *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 and *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381 the evidence by the plaintiff must be assumed to be true in the absence of any evidence from the defendant. The learned Judicial Commissioner misdirected himself by failing to apply this principle and instead applying treating the case as if the defendant had led evidence. He, therefore, went on to evaluate the plaintiff's evidence and found it was difficult to believe and preferring the defendant's version in the absence of any evidence whatsoever adduced by the defendant. By this misdirection, he has in our view arrived at an erroneous conclusion and that alone is an appealable error that warrants our intervention.

Issue (ii): How Is The Plaintiff To Establish That The Standard Of Care Has Been Breached?

(a) Is it necessary to call separate medical experts apart from the treating doctors to establish a breach of the standard of care in relation to the *Bolam* test?

[11] We find that the plaintiff had successfully established that there was a breach of duty on the part of the defendant by relying on the evidence of the treating doctors, PW4, PW5 and PW6. We do not agree with the defendant that the plaintiff is obliged to bring in separate medical experts to establish the breach of duty. We are fortified by passages in *Sarkar on the Law of Evidence* and the case of *Krishnan Nambiar G Perabakaran & Ors v. Dr P Mahendran & Anor* [2004] 5 CLJ 73; [2004] 5 MLJ 77.

Issue (iii): Was There A Breach Of The Duty Of Care In The Failure Of The Defendant To Advise On The Risk As Determined In Foo Fio Na?

[12] This revolves on the failure to advise on the risk of the procedure. The learned judge erred in failing to treat the plaintiff's evidence as being true as per *Jaafar Shaari*. Instead, the learned judge queried the veracity or credibility of the plaintiff without hearing any rebuttal evidence from the defendant. He should have accepted the plaintiff's evidence and had he done so, he would have concluded differently.

Issue (iv): Is The Doctrine Of Res Ipsa Loquitur Inapplicable In A Medical Negligence Case?

[13] We concur with the decision in *Ratcliffe*'s case (*Ratcliffe v. Plymouth and Torbay HA* [1998] Lloyd's Rep Med 162) that the doctrine of *res ipsa loquitur* which is an evidential doctrine, is indeed applicable in all negligence cases including medical negligence. In *Shalini*'s case (*Shalini Kanagaratnam v. Pusat Perubatan Universiti Malaya & Anor* [2016] 6 CLJ 225) this court held that this doctrine is not normally available. But it does not state that the doctrine is inapplicable. Each case must necessarily depend on its facts.

Issue (v): Was Causation Established By The Plaintiff?

[14] We are of the view that causation has been established by the plaintiff. This is evident from the testimony of PW6 who diagnosed the plaintiff's condition as "nosocomial infection of the skin which was complicated after the procedure". The use of that phrase in itself shows that the nosocomial infection arose prior to further complications. In all probabilities, this means in turn that the infection arose *in situ* at the defendant's clinic. Moreover, there was no break in her continuously deteriorating situation. Further, the infection was localised rather than systemic. All these factors suggest on a balance of probabilities that the cause of the infection was the lack of sterility as testified by the treating doctors.

[15] The learned judge erred in concluding that the infection could possibly have arisen from other hospital environments or the workplace. The latter cannot be the case as there is no evidence before the court that she did return to work.

[16] The learned judge further held that the defendant should have come forward and proven that he kept a sterile environment in his clinic. Keeping a sterile environment he reasoned, does not eliminate the risk, but merely minimises it. In so concluding, by relying solely on a statement by DW4, the learned judge further erred by speculating on such an outcome without any evidential basis.

[17] In all these circumstances, particularly the defendant's failure to testify, we are satisfied that the plaintiff succeeded in establishing a case of negligence against the defendant, which was never rebutted. The failure on the part of the defendant to testify is the crux of the case. The plaintiff had established from the evidence a *prima facie* case which warranted rebuttal. Adopting the position of no case in answer and taking the decision not to call the doctor meant that the plaintiff's *prima facie* case was not rebutted at all. In these circumstances, the only reasonable conclusion to arrive at is that the plaintiff had proven its case on a balance of probabilities. We, therefore, find that the defendant is liable and set aside the decision of the learned High Court Judge.

[18] On the issue of quantum of damages, we award the sum of RM27,320 by way of special damages. As for general damages, we include the heads of claim: scarring (RM40,000), pain and suffering (RM80,000) and mental anguish (RM90,000). We award a global sum of RM210,000 by way of general damages subject to 5% interest from the date of the High Court decision.